SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 595

CO-OPERATIVE TRANSIT COMPANY,
Petitioner,

vs.

HYPHA DAYOUB.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

No opinion of the United States Circuit Court of Appeals has been reported. The order of affirmance (R. 207) sets out the findings of the Court.

II.

Jurisdiction.

The judgment order of the Circuit Court of Appeals was entered October 13, 1943.

The jurisdiction of the Court is invoked under paragraph b of Section 5 of Rule 38 and Section 240 (a) of

the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938.

III.

Statement.

The street car involved in the accident complained of by the plaintiff in the trial court was propelled by electricity, was of the kind known by the defendant as the Cincinnati type (R. 101) and was operated by one man. Passengers entering the car stepped up thirteen inches from the ground to a step which was thirteen inches below a platform where the operator of the car, or motorman, worked. From this platform there was a step twelve inches high to the floor of the car on which the seats were located (R. 105). There was an aisle between the seats of the car and in the center of this aisle at the place where passengers stepped up into the car from the motorman's platform there was an iron rod extending from the floor of the car to the roof, placed there to aid passengers getting on and off (R. 102, Exhibits 1, 2 and 4; R. 203-205).

The plaintiff boarded the car which had stopped to receive her as a passenger, dropped her fare in a box on the motorman's platform at the motorman's right and turned to step up into the aisle of the car, when the accident occurred (R. 30, 129-130).

The plaintiff testified on direct examination that the motorman started the car with a hard jerk "before I was half-way standing"; that he jerked it so hard she was thrown off her feet, but on cross-examination testified that she was not thrown off her feet (R. 48). She also testified on direct examination that she held onto the rod which she described as the "bar", with her right arm; that she carried a purse under her left arm; that she was jerked back and forth and that she felt something hurt in her shoulder (R. 30, 31, 32). She bumped her shin on the

step and testified that when she let herself go she kneeled down (R. 48).

On cross-examination the plaintiff testified that as soon as she got on the car it started to move; that she then paid her fare and turned to go into the car and that it was moving "very much" when she paid her fare (R. 43).

There was no claim made at the trial and there is no testimony in the record that the car stopped after it started or that the forward motion of the car was at anytime arrested.

The plaintiff produced two witnesses to testify as to the "jerk" with which the car started. One said she was standing about ten feet from the car and that when the plaintiff went in the car the car made "awful hard jerk" (R. 66). She did not see what effect the starting of the car had on the plaintiff, or on the motorman, or anyone who was in the car (R. 69-70) and only knew that the car started with a jerk the like of which she had never seen (R. 70). The other was a passenger on the car. She testified that while the plaintiff was coming in, the car started to go and "kind of shook her down" and that plaintiff grabbed the iron post and swung around (R. 75). This witness wouldn't say that the car started differently from the way a car ordinarily starts, but said the car was always "terribly shaking" (R. 75). She was sitting on the end of the seat and couldn't remember whether the motion of the car disturbed her particularly (R. 76).

The motorman and two passengers were standing on the front platform of the car. Neither of these passengers had hold of any part of the car and the motion of the car when it started did not disturb or change the position of either (R. 125, 126, 130, 131, 139) or that of the motorman.

Four persons who were sitting in the car testified either that the movement of the car when it started did not throw them forward or backward or cause them to move forward

or backward, or that they did not notice anything out of the usual in the way the car started or testified that the car started in the usual manner (R. 113, 117, 119, 120, 121).

There was abundant evidence introduced tending to show the plaintiff was guilty of contributory negligence (R. 112, 120-121, 129, 138, 144).

At the conclusion of the charge to the jury the court submitted certain interrogatories to the jury, which interrogatories to the jury and the answers which the jury returned with its general verdict, which was in favor of the plaintiff and for two thousand dollars, were (R. 195-196) as follows:

> "1. Did the car of the defendant, upon which the plaintiff was a passenger on the occasion of which she complains, start with a jerk unusual in some respect such as in its suddenness, force or violence? Answer: Yes.
>
> 2. Did the plaintiff, while a passenger on the street car of the defendant and at the time alleged in her complaint, suffer some personal injuries? Answer: Yes.
>
> 3. If the answer to interrogatories numbered 1 and 2 are both in the affirmative, were such injuries directly and proximately caused by the starting of such car with a jerk, unusual in some respect such as its suddenness, force or violence? Answer: Yes.
>
> 4. Was the plaintiff on said occasion guilty of any negligence directly and proximately contributing to any injuries received by her? Answer: Yes."

When the jury returned its general verdict and its answers to the interrogatories as set out above, the court called counsels' attention to Rule 49 of the Federal Rules of Civil Procedure and announced that it was the intention of the court to return the jury for further consideration of its answers and verdict and then said to the jury that there was an inconsistency between the general verdict

and its answer to the fourth interrogatory, in which the jury answered that it found the plaintiff guilty of contributory negligence, read from the general charge to the jury that part of the charge which pertained to contributory negligence and which had previously been read to the jury, told the jury that is was quite evident from the part of the charge read that the plaintiff could not be guilty of contributory negligence as indicated by the jury's reply to the fourth interrogatory and at the same time be entitled to a verdict against the defendant; that the plaintiff either was not guilty of contributory negligence or was not entitled to recover; that in view of these facts the jury would be asked to reconsider the verdict and the answers to the interrogatories and that the court would further instruct the jury that if the jury's answer to the fourth interrogatory was correct, then the general verdict must be for the defendant instead of the plaintiff, and on the other hand, if the answer to the fourth interrogatory should be "No", the general verdict was correctly rendered for the plaintiff and the answer to the fourth interrogatory should be changed to conform thereto.

The court then said to the jury that, as the court had theretofore instructed the jury, a plaintiff guilty of contributory negligence or want of due care for her safety could not recover, that therefore, if the plaintiff was guilty of contributory negligence, the jury's verdict must be for the defendant and if the plaintiff was not guilty of contributory negligence, that then the jury might render a verdict in her favor, and retired the jury to the jury room for further consideration of the answers given by the jury to the interrogatories and the general verdict in accordance with the additional instructions as given (R. 196-199).

The jury, thereupon, retired and returned a general verdict as it was originally returned and changed the answer "Yes", which it had made to the contributory negligence

interrogatory, that is, interrogatory number 4, from "Yes" to "No" (R. 200), and judgment was subsequently entered for the plaintiff in the amount of the general verdict.

IV.

Argument.

A.

The Interpretation Put on Rule 49 of the Rules of Federal Procedure by the Lower Courts eliminates the Right of Litigants to Have Verdicts Tested by Findings of Fact.

The office of interrogatories is to test the general verdict. If the trial court can, under Rule 49 of the Rules of Federal Procedure, after a jury has considered a case and returned its general verdict and its answer to an interrogatory by which answer it has honestly determined an issue of fact, call the jury's attention to the fact that its answer is inconsistent with the general verdict, instruct the jury as to the effect its answer has on the general verdict and tell the jury what the answer to the interrogatory should be in order to make the general verdict stand, as the trial court did in the instant case, the unhampered determination of the issue of fact is lost and it would seem that the rule is purposeless. That part of Rule 49 involved in the instant case reads:

> "(b) General verdict accompanied by answer to interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general

verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

Many of the states have statutes which provide for the submission of interrogatories to juries. In Ohio the statute gives the right to submit particular questions of fact. In some states the practice is to ask for special verdicts. In Texas answers are made to special issues. In practically all the states where the practice obtains the courts of last resort have held that it is prejudicial error for the court to inform the jury of the effect of its answer to an interrogatory.

Walsh v. *J. R. Thomas' Sons,* 91 O. S. 210 and cases therein cited.

The following is taken from the syllabus of *Union Painless Dentists* v. *Guerra,* 234 S. W. 688:

> "Where jurors returned answers to special issues inconsistent with one another and which would not support a general verdict, court should not have indicated to the jury what was deemed to be an inconsistency but should have only returned the jury for further consideration."

What the trial court said to the jury that the reviewing court held erroneous is set out in the report as follows:

> "Gentlemen of the jury: Referring to the verdict returned by you, I must call your attention to the fact that your answer to question 3 and your failure to answer question 4, are inconsistent with your answer to question 8. You are therefore instructed to reconsider your verdict in view of this inconsistency."

Beach v. *Gehl*, 204 Wis. 367, 235 N. W. 778 Syllabus 5:

> "Instruction which expressly or impliedly informs jury of effect of answer to question of special verdict on either party's ultimate right or liability is erroneous."

Asch v. *Washburn Lignite Coal Company*, 48 N. D. 734, 186 N. W. 757.

In re Flemming's Estate, 42 S. D. 193, 173 N. W., 836.

B

Lower Court Misapplied Decisions of Supreme Court of Ohio.

The Supreme Court of Ohio has repeatedly recognized the priciple that the adjective characterization of a jerk in the starting of a street car without supporting evidence of the effect of the movement on the car is not sufficient to justify a recovery and in each case where recovery has been allowed there has been such proof.

Cleveland Ry. Co. v. *Hunt*, 116 Ohio State 291.
Cleveland Ry. Co. v. *Merk*, 124 Ohio State 596.
Yager, Receiver, v. *Marshall*, 129 Ohio State 584.

See particularly discussions of the *Hunt* and *Merk* cases in the opinion in *Yaker, Receiver,* v. *Marshall,* pages 586 and 587.

In the instant case, as hereinbefore noted, there was absolutely no proof on behalf of the plaintiff of the effect of the movement of the car on anyone in the car and the defendant showed that the movement of the car had no effect whatever on passengers standing on the platform or passengers seated in the car.

Respectfully submitted,

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